UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KARTHIKEYAN V. VEERA, Plaintiff, - against - AMBAC PLAN ADMINISTRATIVE COMMITTEE, et al., Defendants.	Civil Action No. 10-cv-4191 (HB)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO CERTIFY THE COURT'S JANUARY 6, 2011 ORDER FOR INTERLOCUTORY APPEAL AND TO STAY RELATED PROCEEDINGS PENDING RESOLUTION OF APPEAL

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Defendants Ambac Plan Administrative Committee, Ambac Compensation Committee, Ambac Plan Investment Committee, Diana Adams, Gregg. L. Bienstock, Jill M. Considine, Philip N. Duff, Robert Eisman, Thomas J. Gandolfo, Anne Gill Kelly, Sean T. Leonard, William McKinnon, Douglas C. Renfield-Miller, Timothy J. Stevens, Thomas C. Theobald, Laura S. Unger, and Henry D.G. Wallace (collectively, "Defendants") respectfully request that the Court certify its Order of January 6, 2011 (the "Order") denying Defendants' motion to dismiss for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), because the Order involves controlling questions of law on which there is substantial ground for difference of opinion and an immediate appeal may materially advance the ultimate termination of the litigation. Defendants also request that the Court stay proceedings pending the appeal.

I. INTRODUCTION

Plaintiff brought this case under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 *et seq.*, after the price of the Ambac Financial Group, Inc. ("Ambac") stock held in his 401(k) plan account fell. He seeks relief for alleged losses in the value of the stock between October 1, 2006 and July 2, 2008. Plaintiff contends that during this period it was a violation of ERISA's fiduciary obligations to offer Ambac stock as an investment option under the Savings Incentive Plan (the "Plan"). Defendants moved to dismiss the claim under Fed. R. Civ. P. 12(b)(6). In its January 6, 2011 Order, the Court denied the motion.

The Court's holdings in the Order raise important legal issues over which courts in this and other districts have disagreed. Because of that fact, and because the requirements for interlocutory appeal established in 28 U.S.C. § 1292(b) are met, Defendants respectfully request that the Court certify the following controlling questions of law, resolution of which will terminate this case, for interlocutory review by the Second Circuit:

(1) Whether ERISA § 404(a)(2)'s[1] diversification exemption for "eligible individual account plans" ("EIAPs") precludes a claim that an EIAP fiduciary violated § 404(a)(1)'s[2] duty of prudence by declining to sell employer securities (the "Diversification Issue")?

(2) Whether plan language requiring that employer securities shall be maintained as an investment option under a plan eliminates fiduciary discretion to remove the employer securities from the plan and, therefore, eliminates liability for maintaining such securities (the "Hard-wiring Issue")?

(3) Whether the presumption of prudence arising under ERISA § 404(a)(1), known as the *Moench* presumption,[3] should be applied at all and, if so, strictly by a district court when considering a Rule 12(b)(6) motion to dismiss claims of imprudent retention of employer securities (the "Presumption Issue")?

(4) Whether dismissal is required where a plaintiff fails to plead facts establishing that retention of employer securities was imprudent at the beginning of the class period (the "Class Period Issue")?

II. ARGUMENT

A. Standard For Certifying An Order For Interlocutory Appeal.

A district court may certify a non-final order for interlocutory appeal when: (1) the order "involves a controlling question of law;" (2) "as to which there is a substantial ground for difference of opinion;" and (3) "an immediate appeal of the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

Under § 1292(b), a controlling question of law exists not only where "reversal of the district court's opinion could result in dismissal of the action[,]" but also where "reversal of the district court's opinion, even though not resulting in dismissal, could significantly affect the conduct of the action . . . ." *New York v. Gutierrez*, 623 F. Supp. 2d 301, 316 (E.D.N.Y. 2009); *see also Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990) ("[T]he resolution of an issue need not necessarily terminate an action to be 'controlling' . . . ."). Thus, "controlling question of law" "has a much broader meaning in the context of §1292(b)." 19 *Moore's Federal Practice* § 203.31 (Matthew Bender 3d ed. 2004). A question is controlling, and accordingly a prime candidate for interlocutory appellate review, when it holds broader significance for the Circuit. *See Klinghoffer*, 921 F.2d at 24 (acknowledging certification may be proper if the certified issue has precedential value for large number of pending suits); *see also In re Worldcom, Inc. Sec. Litig.*, No. 02 Civ. 3288, 2003 WL 22953644, at *5 (S.D.N.Y. Dec. 16, 2003) ("Although a question of law need not affect a wide range of pending cases to be considered controlling, the system-wide costs and benefits may be considered in determining whether an interlocutory appeal is appropriate." (internal quotation marks omitted)); *Telectronics Proprietary, Ltd. v. Medtronic, Inc.*, 690 F. Supp. 170, 173 (S.D.N.Y. 1978) (granting certification issue was of "immense importance" to variety of interests).

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[1] Section 404(a)(2) states in relevant part, "in the case of an eligible individual account plan (as defined in § 407(d)(3)), the diversification requirement . . . and the prudence requirement (only to the extent it requires diversification) . . . *is not violated by the acquisition and holding of qualifying employer real property or qualifying employer securities*." 29 U.S.C. § 1104(a)(2) (emphasis added).

[2] Section 404(a)(1) states in relevant part, "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1).

[3] The presumption originated in *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995).

An issue raises substantial grounds for difference of opinion warranting interlocutory appeal where (1) there is conflicting authority on the issue, or (2) the issue is particularly difficult and of first impression for the Second Circuit. *Consub Del. LLC v. Schahin Engenharia Limitada*, 476 F. Supp. 2d 305, 309 (S.D.N.Y. 2007). Certification for interlocutory appeal is appropriate where "the conclusions reached by the Court were by no means the only reasonable conclusions that an impartial arbiter could reach." *Chan v. City of New York*, 803 F. Supp. 710, 733 (S.D.N.Y 1992).

To satisfy § 1292(b)'s final element, immediate appeal must have the potential to substantially accelerate the final disposition of the matter. *Id.* at 733. An immediate appeal is considered to substantially accelerate termination of the litigation if the appeal promises to advance the time for trial or shorten the time required for trial. *Transp. Workers Union, Local 100 v. N.Y. City Transit Auth.*, 358 F. Supp. 2d 347, 350 (S.D.N.Y. 2005).

Resolution in Defendants' favor of any of the four questions for which Defendants seek certification will result in termination of this litigation. Thus, the argument on the third certification factor – whether immediate appeal has the potential to substantially accelerate the final disposition of the matter – is the same for each question. For efficiency and clarity purposes, this motion first explains, separately for each of the four legal questions, why the first and second certification elements are satisfied. Then, the motion addresses the third certification element as it applies to all four legal questions.

B. The First And Second Certification Elements Are Satisfied With Respect To The Diversification Issue Because The Issue Presents A Controlling Question Of Law As To Which There Is Substantial Ground For Difference Of Opinion.

1. The Diversification Issue Presents A Controlling Question Of Law.

The Court's January 11 Order involves a controlling question of law – whether ERISA § 404(a)(2)'s exemption from the diversification requirement precludes a claim, like the one asserted here, that an EIAP fiduciary violated § 404(a)(1)'s duty of prudence by declining to sell employer securities. This legal question is controlling not only because it is premised on interpretation of ERISA's statutory language, but also because its resolution could result in dismissal of the entire action and have Circuit-wide implications.

Section 1292(b) certification is appropriate where, as here, a legal question raises an issue of statutory interpretation. *See Doe v. Scott*, 652 F. Supp. 549, 553 (S.D.N.Y. 1987) (finding question controlling where it involved question of statutory interpretation and court's decision diverged from only other opinion on issue). Employer securities are given special treatment under ERISA. While fiduciaries ordinarily have a duty to diversify a plan's investments, EIAPs that invest in employer securities are exempt from this requirement. EIAPs enjoy a statutory exemption, set forth in ERISA §404(a)(2), from the diversification requirement as it pertains to the acquisition and holding of employer securities and from the prudence requirement to the extent it requires diversification. *See* 29 U.S.C. § 1104(a)(2). EIAPs are exempt from diversification because they do more than act as vehicles for retirement saving; they encourage employee ownership and direct participation in the employer's success and afford employees intangible and non-economic benefits, including the right to participate in corporate governance by voting their shares. *See Steinman v. Hicks,* 352 F.3d 1101, 1103 (7th Cir. 2003) ("Congress, believing employees' ownership of their employer's stock a worthy goal, has encouraged the creation of [employee stock ownership plans] [] by . . . waiving the duty ordinarily imposed on trustees by modern trust law to diversify the assets of a pension plan.")

Consistent with the holdings of several courts,[4] Defendants' motion to dismiss argued that the plain language of § 404(a)(2) exempts any claim against an EIAP fiduciary based on the fiduciary's investment of plan funds in employer securities, because any obligation to sell employer securities is simply an obligation to diversify those securities. Plaintiff's prudence claim, the motion to dismiss contended, is tantamount to a failure to diversify claim and § 404(a)(2)'s exemption precludes such a claim. The Court rejected this contention, impliedly interpreting § 404(a)(2) to allow claims that a plan's investment in employer securities should be

[4] *See, e.g.*, *In re SunTrust Banks, Inc. ERISA Litig.*, Civil Action No. 1:08-CV-3384-RWS, 2011 WL 13824, at *4 (N.D. Ga. Jan. 3, 2011) (explaining, in certification order, that court's dismissal of investment claim rested on reasoning that plain language of § 404(a)(2) exempts any claim against EIAP plan fiduciary based on investment of plan funds in employer securities); *In re Beazer Homes USA, Inc. ERISA Litig.*, No. 1:07-CV-09525-RWS, 2010 WL 1416150, at *6 (N.D. Ga. Apr. 2, 2010) (dismissing prudence claim because it amounted to "just . . . another form of diversification argument"); *In re Calpine Corp. ERISA Litig.*, No. 03-1685, 2005 WL 1431506, at *4 (N.D. Cal. Mar. 31, 2005) (deeming inconsistent with § 404(a)(2)'s plain language plaintiff's claim that defendants breached their duty of prudence by failing to deselect or diversify employer securities). Resolution of the Diversification Issue in Defendant's favor here would similarly result in dismissal of Plaintiff's prudence claim.

sold. Because the Court's Order on the Diversification Issue relies on an issue of statutory interpretation, it presents a controlling question of law appropriate for certification.

Where, as is the case here, the legal argument presented would yield an immediate dismissal of a lawsuit, the issue presents a controlling question under § 1292(b) and is appropriate for certification. *See Klinghoffer*, 921 F.2d at 24. Resolution of the Diversification Issue in Defendants' favor result in dismissal of Plaintiff's prudence claim. Absent a viable claim for failure to sell Ambac stock, Plaintiff's derivative monitoring claims would also be dismissed. *See Johnson v. Radian Group, Inc.*, Civil Action No. 08-2007, 2009 WL 2137241, at *24 (E.D. Pa. July 16, 2009) (dismissing derivative failure to monitor claim were plaintiff failed to adequately state claim for breach of fiduciary duty in imprudence or failure to disclose).

Moreover, a resolution of the Diversification Issue would have significant precedential value and benefit future litigants in the Second Circuit. *See Klinghoffer*, 921 F.2d at 24 (describing decisions holding broader significance for Second Circuit as "prime candidates" for interlocutory review). In the past eighteen months, no fewer than eleven decisions, including the decision in this case, have been issued by nine different judges in the Southern District in cases involving allegations that ERISA plan fiduciaries imprudently continued to offer employer securities as an investment option.[5] Undoubtedly, other cases involving similar allegations are pending in the Second Circuit, and the judges presiding over those cases would benefit from an appellate ruling on the scope of the § 404(a)(2) exemption. The potential Circuit-wide significance of a ruling on the Diversification Issue supports a finding that the question is controlling and appropriate for certification.

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[5] *See, e.g.*, *In re Bear Stearns Cos. Sec., Derivative & ERISA Litig.*, 08 MDL 1963, 2011 WL 223540 (S.D.N.Y. Jan. 19, 2011) (Sweet, J.); *Veera v. Ambac Plan Admin. Comm.*, No. 10 CV 4191(HB), 2011 WL 43534 (S.D.N.Y. Jan 6, 2011) (Baer, J.); *In re Am. Express Co. ERISA Litig.*, No. 08 Civ. 10834(JGK), 2010 WL 4371434 (S.D.N.Y. Nov. 2, 2010) (Koetl, J.); *In re SLM Corp. ERISA Litig.*, No. 08 Civ. 4334 (WHP), 2010 WL 3910566 (S.D.N.Y. Sept. 24, 2010) (Pauley, J.); *In re Bank of Am. Corp. Sec., Derivative & ERISA Litig.*, No. 09 MD 2058 (PKC), 2010 WL 3448197 (S.D.N.Y. Aug. 27, 2010) (Castel, J.); *Fisher v. JPMorgan Chase & Co.*, No. 03 Civ. 3252 (SHS), 2010 WL 1257345 (S.D.N.Y. Mar. 31, 2010) (Stein, J.); *Herrera v. Wyeth*, No. 08-Civ.-4688, 2010 WL 1028163 (S.D.N.Y. Mar. 17, 2010) (Sullivan, J.); *Gearren v. McGraw-Hill Cos.*, 690 F. Supp. 2d 254 (S.D.N.Y. 2010) (Sullivan, J.), *appeal docketed*, Nos. 10-792 & 10-934 (2d Cir. Mar. 4, 2010); *In re Lehman Bros. Sec. & ERISA Litig.*, 683 F. Supp. 2d 294 (S.D.N.Y. 2010) (Kaplan, J.); *In re Morgan Stanley ERISA Litig.*, 696 F. Supp. 2d 345 (S.D.N.Y. 2009) (Sweet, J.); *In re Citigroup ERISA Litig.*, No. 09-3804, 2009 WL 2762708 (S.D.N.Y. Aug. 31, 2009) (Stein, J.), *appeal docketed*, No. 09-3804 (2d Cir. Aug. 31, 2009).

In a recent decision, Judge Story of the Northern District of Georgia certified for interlocutory appeal to the Eleventh Circuit a controlling question of law substantially identical to the question Defendants seek to certify here. *See SunTrust Banks*, 2011 WL 13824, at *7 (granting plaintiffs' motion for certification pursuant to § 1292(b)).[6] In *SunTrust Banks*, plaintiffs alleged that plan fiduciaries breached their ERISA duties by maintaining the plan's large investment in employer securities notwithstanding, among other things, "(a) the Company's substantial exposure to subprime mortgage loan losses and (b) the Company's failure to properly account for and to disclose its exposure to losses tied to the illiquidity of mortgage-backed securities and its business operations in the declining real estate market." *Id.* at *1. Judge Story dismissed the plaintiffs' prudence claim, finding that, as a matter of law, it amounted to a claim that defendants had a duty to sell (and diversify) the employer securities, a claim foreclosed by § 404(a)(2). *Id.* Plaintiff then sought, and the court granted, certification of a controlling question of law regarding the viability of a prudence claim, in light of § 404(a)(2)'s diversification exemption, against an EIAP fiduciary for retaining employer securities in the EIAP. *See id.* at *4, 7.

Here, the Diversification Issue presents the same controlling question of law. The Court rejected Defendants legal argument that § 402(a)(2) precludes a claim that a fiduciary has a duty to sell employer securities – regardless of the label Plaintiff attaches to his claim. Given the controlling nature of this legal argument, the first certification element is satisfied.

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6 Counsel for Plaintiff in this case also represented the *SunTrust Bank* plaintiffs.

2. Substantial Grounds For Disagreement Exist With Respect To The Diversification Issue, And The Second Circuit Has Not Addressed The Issue.

The Diversification Issue has not yet been addressed by the Second Circuit and, therefore, is appropriate for certification. Issues of first impression are uniquely suitable for interlocutory review. *See, e.g.*, *In re Joint E. & S. Dist. N.Y. Asbestos Litig.*, 897 F.3d 626, 627 (2d Cir. 2001) (addressing matter of first impression on interlocutory appeal); *Green v. Fund Asset Mgmt., L.P.*, 245 F.3d 214, 220 (3d Cir. 2001) (same); *Camacho v. Mancuso*, 53 F.3d 48, 50 (4th Cir. 1995) (same); *Adkinson v. Int'l Harvester Co.*, 975 F.2d 208, 211 (5th Cir. 1992) (same).

Moreover, courts that have previously faced the Diversification Issue have decided it with difficulty and with conflicting results. Certification is appropriate where the question is difficult and the conclusion reached by the court is by no means the only reasonable conclusion that an impartial arbiter could reach. *Chan*, 803 F. Supp. at 733. Here, Defendants need not argue that an impartial arbiter *could reach* a different decision, as several impartial arbiters *have already reached* different decisions on the Diversification Issue. *Compare, e.g.*, *Smith v. Delta Air Lines, Inc.*, 422 F. Supp. 2d 1310, 1327 (N.D. Ga. 2006) (dismissing prudence claim where plaintiffs attempted to recast diversification claim into prudence claim), *and SunTrust Banks*, 2011 WL 13824, at *4 (noting dismissal relied upon legal conclusion that "[§] 404(a)(2) exempts ERISA fiduciaries from the duty of prudence to the extent that the fiduciary's actions involve the investment of plan assets in company stock"), *with, e.g.*, *Quan v. Computer Scis. Corp.*, 623 F.3d 870, 878 (9th Cir. 2010) (recognizing distinction between diversification claim and claim that defendants breach fiduciary duty by offering employer securities as investment option),[7] *and*

[7] *Quan* conflicts with *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1097 (9th Cir. 2004), another Ninth Circuit decision made four and a half years prior. In *Wright*, the Ninth Circuit declined to adopt the *Moench*

YRC Worldwide, Inc. ERISA Litig., No. 09-2593-JWL, 2010 WL 4386903, at *3 (D. Kan. Oct. 29, 2010) (holding prudence claim based on simply offering employer securities as investment option distinct from diversification claim).

The fact that several courts have rejected the Court's conclusion that § 404(a)(2)'s exemption permits a "prudence" claim based on investment in employer securities supports certification. Those courts have dismissed claims that a fiduciary has a duty to sell employer securities and cease further purchases, holding they are simply claims that the fiduciary should have diversified the employer securities. *See, e.g.*, *SunTrust Banks*, 2011 WL 13824, at *4 (explaining, in certification order, that court's dismissal of investment claim rested on reasoning that plain language of § 404(a)(2) exempts any claim against EIAP plan fiduciary based on investment of plan funds in employer securities); *Beazer Homes*, 2010 WL 1416150, at *6 (stating plaintiffs' contention that fiduciaries acted imprudently by holding employer securities "just amounts to another form of diversification argument" and dismissing prudence claim); *Mellot v. ChoicePoint*, 561 F. Supp. 2d 1305, 1311-12 (N.D. Ga. 2007) (dismissing breach of fiduciary duty claim challenging investment in employer securities); *Smith*, 422 F. Supp. 2d at 1327 (holding that imprudence claim based on heavy investment in company securities "just amounts to another for of diversification argument" precluded by § 404(a)(2)); *Pedraza v. Coca-Cola Co.*, 456 F. Supp. 2d 1262, 1274-75 (N.D. Ga. 2006) (holding imprudence claim amounts to another form of diversification argument from which § 404(a)(2) exempts fiduciaries); *Calpine*, 2005 WL 1431506, at *4 ("[P]laintiff's claim that Defendants breached their duty of

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presumption because it did not go far enough and because "[i]nterpreting ERISA's prudence requirement to subject EIAPs to an albeit tempered duty to diversify arguably threatens to eviscerate congressional intent and the guiding rationale behind EIAPs themselves." The *Quan* panel rejected *Wright*'s position on the *Moench* presumption, characterizing the position as inconsistent with § 404(a)(2). These two decisions, from the same circuit court, highlight the difficultly and lack of consensus associated with the Diversification Issue.

prudence by failing to deselect or diversify the [employer] stock fund appears inconsistent with the plain meaning of [§] 404(a)(2).")

The *SunTrust Banks* court acknowledged the existence of conflicting authority in finding substantial grounds for difference of opinion regarding a nearly identical question to the diversification question articulated here. *See* 2011 WL 13824, at *6. The court further explained that given the tension between ERISA's competing goals – preference for investment in employer securities versus general fiduciary duties – substantial grounds for difference of opinion exist regarding the correct interpretation of § 404(a)(2). *Id.* (citing *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 253 (5th Cir. 2008)). The exact same rationale applies here. Accordingly, the second certification element is satisfied with respect to the diversification question.

C. The First And Second Certification Elements Are Satisfied With Respect To The Hard-wiring Issue Because The Issue Presents A Controlling Question Of Law As To Which There Is Substantial Ground For Difference Of Opinion.

1. The Hard-wiring Issue Presents A Controlling Question Of Law.

The Court's January 11 Order involves a second controlling question of law, *i.e.*, whether plan language requiring that employer securities shall be maintained as an investment option forecloses any fiduciary from exercising discretion with respect to those securities. The Court answered this purely legal question in the negative, acknowledging that its decision was contrary to the decision in *Citigroup*. Defendants now seek certification of the question for interlocutory appeal because its resolution could result in dismissal of the entire action and have Circuit-wide implications and, accordingly, the question is controlling.

A Second Circuit decision in Defendants' favor on the Hard-wiring Issue would result in immediate dismissal of Plaintiff's claims. *See Klinghoffer*, 921 F.2d at 24 (explaining first §

1292(b) criteria satisfied where resolution of legal question would terminate litigation). To proceed with a prudence claim, a plaintiff must establish that the defendant was acting as a fiduciary when taking the action subject to the complaint. Absent evidence to prove fiduciary status with respect to the relevant conduct, a prudence claim fails. Accordingly, "[t]he 'threshold question' in 'every case charging breach of ERISA fiduciary duty' is whether the defendant 'was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to Amended Complaint.'" *Citigroup*, 2009 WL 2762708, at *12 (citation omitted). For fiduciary duties to apply, the act or omission complained of must be *fiduciary* in nature. *See Pegram v. Herdich*, 530 U.S. 211, 226 (2000). Plan design, however, is a *settlor* function not subject to fiduciary review. *See, e.g.*, *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999) ("In general, an employer's decision to amend the pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets."); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) ("Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries.").

Defendants' motion to dismiss argued that, as a matter of law, discretion, and therefore fiduciary status, was foreclosed by Plan language requiring that Ambac stock shall be maintained as an investment option under the Plan. Two recent Southern District of New York cases dismissed prudence claims based on this rule of law and substantially identical plan language. *See Am. Express*, 2010 WL 4371434, at * 9 (holding that plan language stating "Trust Fund shall consist in part of the Company Stock Fund" forecloses fiduciary discretion with regard to whether plan will offer Company Stock Fund); *Citigroup*, 2009 WL 2762708, at *3, 15 (declaring plan language stating "the Citigroup Common Stock Fund *shall be* permanently maintained as an Investment Fund under the Plan" deprived defendants of discretion to remove employer securities and immunized them from suit for failing to do so). In both decisions, the court held that, as a matter of law, plan language requiring that employer securities shall be maintained as an investment option forecloses fiduciary discretion (and status) with respect to that stock.

This case presents the same legal question that led to dismissal of the *American Express* and *Citigroup* plaintiffs' claims. Here, the Court decided the controlling legal question against Defendants on purely legal grounds. A different decision on the question would have resulted in immediate dismissal of Plaintiff's claims. Accordingly, the Hard-wiring Issue constitutes a controlling question of law, and the first certification element is satisfied.

The Court's Opinion distinguishes the language in the Ambac Plan from the language in the *Citigroup* and *American Express* plans and states that Defendants have not pointed to language "expressly removing discretionary authority." (Docket No. 51, p. 5). All three plans (Ambac's, Citigroup's, and American Express'), however, contain language stating that employer securities "shall" be an option under the plan. Whether language stating that employer securities "shall" be an option under the plan forecloses fiduciary discretion is a pure and controlling question of law appropriate for consideration along with the overarching legal and controlling question of whether plan language may, under any circumstances, remove fiduciary discretion with respect to employer securities. *See Kovach v. Zurich Am. Ins. Co.*, 587 F.3d 323, 339 (6th Cir. 2009) ("The case before us has no unresolved factual issues; instead, its resolution revolves around the proper interpretation of the Plan provisions--a question of law . . . ."); *see also In re Reliant Energy ERISA Litig.*, 336 F. Supp. 2d 646, 667 (S.D. Tex. 2004) ("[T]he Court is not required to take at face value Plaintiff's vague allegations if they are belied by the Plan themselves."); *In re Williams Cos. ERISA Litig.*, 271 F. Supp. 2d 1328, 1338 (N.D. Okla. 2003) (dismissing claims against defendant where plan documents refuted plaintiffs' allegations of fiduciary status); *Crowley v. Corning, Inc.*, 234 F. Supp. 2d 222, 228-229 (W.D.N.Y. 2002) (dismissing claims against alleged fiduciaries when plan documents confirm that they did not have fiduciary status).

In denying the Defendants' motion to dismiss, the Court also held that language in Section 2.1 of the Trust Agreement[8] indirectly imposed a duty of prudence on the Defendants. In doing so, however, the Court disregarded the fact that the Trust Agreement purports to apply only to Ambac, which is not a party to this litigation. Resolution of the Hard-wiring Issue in Defendants' favor would render that issue moot because the Plan language denying Defendants discretion to remove Ambac stock would trump any indirect language in the Trust document as a matter of law.

Even if the Trust document issue remained relevant, the Court's reliance on the Trust Agreement implicates a purely legal issue recently addressed and decided differently in another case in the Second Circuit, and that issue is appropriate for inclusion in the certification order. *See Herrera*, 2010 WL 1028163, at *5-6 (holding trust agreement language constrained discretion of only one entity – the trustee – who was not a party to lawsuit and rejecting defendants' argument that trust agreement constrained their discretion to remove employer securities from plan). The Court's legal conclusion that the Trust Agreement imposes obligations on Defendants is inconsistent with the Trust Agreement's plain terms and the decision in *Herrera*.

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[8] The language relied upon by the Court states that "the Employer shall use the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use." (Docket No. 48-2, Amended Compl., Ex. E at p. 2). The term "Employer" is defined on page one as "Ambac Financial Group, Inc."

Finally, resolution of the Hard-wiring Issue would not only affect this litigation, but also would impact other stock drop litigation pending in the Second Circuit including *In re GlaxoSmithKline ERISA Litig.*, 1:10-cv-06419-AKH (S.D.N.Y.); *In re Morgan Stanley ERISA Litig.*, 1:07-cv-11285-DAB (S.D.N.Y.); and *In re Pfizer ERISA Litig.*, 1:04-cv-10071-HBP (S.D.N.Y.). The district judges responsible for those matters would benefit from additional appellate guidance on this critical issue. The potential Circuit-wide benefit to allowing the appeal supports the conclusion that the Hard-wiring Issue presents a controlling issue appropriate for certification. *See Klinghoffer*, 921 F.2d at 24 (permitting courts to "consider the system-wide costs and benefits of allowing the appeal").

2. Substantial Grounds For Disagreement Exist With Respect To The Order's Holding On The Hard-wiring Issue.

The plain language of the Court's decision makes clear that there is a substantial ground for difference of opinion on the Hard-wiring Issue. The Court acknowledged that the Second Circuit has not yet decided whether language in a plan document that removes plan managers' discretion to eliminate employer securities can immunize them from suit for maintaining employer securities as an investment option. The Court also acknowledged that courts within the Second Circuit have decided this question differently; the Court specifically cited the *Citigroup* and *Gearren* decisions as having reached diverging conclusions on the Hard-wiring Issue. *Compare Citigroup*, 2009 WL 2762708, at *10-12 (holding plan documents requiring investment in employer securities immunized plan managers from suit for failing to remove employer securities as investment option), *with Gearren*, 690 F. Supp. 2d at 264 (holding plan did not eliminate fiduciaries' discretion and render them immune from liability for breach of fiduciary duty). Ultimately, the Court adopted the authority holding that plan language cannot immunize plan managers' from suit for maintaining employer securities as an investment option. Of additional significance, courts outside the Second Circuit have reached decisions that diverge from the Court's decision here. *See, e.g.*, *Kirschbaum*, 526 F.3d at 250 (holding defendant fiduciaries did not have discretionary authority under plan to remove employer securities because employer securities were "hard-wired" into plan as investment option and "[a]ltering . . . [this] provision[] would have required [the employer], acting in its capacity as a settlor, to amend the Plan");[9] *Urban v. Comcast Corp.*, Civil Action No. 08-773, 2008 WL 4739519, at *12 (E.D. Pa. Oct. 28, 2008) ("[W]here a plan's settlor mandates investment in employer securities, the plan fiduciaries are immune from judicial inquiry related to such investments, essentially because they are implementing the intent of the settlor." (quotations omitted)); *In re Coca-Cola Enters., Inc. ERISA Litig.*, Master File No. 1:06-CV-0953 (TWT), 2007 WL 1810211, at *9 (N.D. Ga. June 20, 2007) ("Because the Plan expressly establishes CCE stock as an investment option, the Committee has the discretion only to select additional investment options, not to eliminate [Coca-Cola] stock from the mix.").

As previously noted, courts confronted with almost identical plan language reached a different conclusion than the Court reached here. Indeed, the Court acknowledged that cases involving similar plan language have found that the plan deprived defendants of any discretion to remove. And there is no meaningful difference between the language in the Ambac Plan and the language found to foreclose fiduciary discretion in recent decisions. *See, e.g.*, *Am. Express*, 2010 WL 4371434, at *4, 9 ("[The] Trust Fund shall consist in part of the Company Stock Fund."); *Citigroup*, 2009 WL 2762708, at *10-12 ("[T]he Citigroup Common Stock Fund shall be permanently maintained as an Investment Fund under the Plan.").

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9 The court went on to find that other extra-plan documents raised fact question as to whether fiduciaries were assigned discretion and denied summary judgment on the issue.

Similarly, regarding the Court's holding that the Trust Agreement imposes a duty on Defendants, the same legal issue presented here was decided differently in *Herrera*. In *Herrera*, defendants pointed to language in the *trust* agreement (not the plan documents) to support their argument that plan fiduciaries had no discretion to remove employer securities. Rejecting defendants' argument, the court held that the trust agreement language applied to only one party – the trustee – and noted that the trustee was not a party to the lawsuit. *See Herrera*, 2010 WL 1028163, at *5-6. Just as in *Herrera*, the Trust Agreement here applies to only one party – the "Employer" (Ambac) – and that party is not a defendant in this lawsuit. The Court's legal conclusion that the Trust Agreement, as a matter of law, imposes obligations on Defendants is inconsistent with the Trust Agreement's plain terms and the decision in *Herrera*.

Given the lack of controlling precedent, the difficulty of the Hard-wiring Issue, and the diverging viewpoints on the issue, substantial grounds for difference of opinion exists, and the second certification requirement is satisfied.

D. The First And Second Certification Elements Are Satisfied With Respect To The Presumption Issue Because The Issue Presents A Controlling Question Of Law As To Which There Is Substantial Ground For Difference Of Opinion.

1. The Presumption Issue Presents A Controlling Question Of Law.

The Court's January 6 Order involves a controlling question of law – whether the presumption of prudence recognized in ERISA employee stock claims should be applied strictly, or at all, by a district court when considering a motion to dismiss under Rule 12(b)(6). The Court's determination that the presumption should not be "strictly" applied (or applied at all) at this stage led to its purely legal conclusion that Plaintiff had stated an ERISA prudence claim by merely alleging a precipitous decline in Ambac's stock price. Resolution of this issue could result in dismissal of the entire action and have Circuit-wide implications and, accordingly, the question is controlling.

There is no doubt that resolution by the Second Circuit of whether a strict application of the *Moench* presumption is appropriate at the pleadings stage could dispose entirely of Plaintiff's prudence claim and his derivative claims. Numerous courts within and outside the Second Circuit ruling on allegations of breach of fiduciary for retaining and buying employer securities have dismissed such claims at the pleading stage, strictly applying the *Moench* presumption. *See, e.g.*, *Citigroup*, 2009 WL 2762708, at *16 (dismissing ERISA imprudence claims as to employer securities based on bank's alleged "pattern of risky loan practices" through investment in "subprime mortgages" and related securities on prudence presumption grounds and recognizing that "following . . . *Twombly*, courts have regularly applied *Moench* at the motion-to-dismiss stage");[10] *see also, e.g.*, *Wright*, 360 F.3d at 1098 ("Plaintiffs' alleged facts effectively preclude a claim under *Moench*, eliminating the need for further discovery.").[11] In dismissing plaintiffs' prudence claims, several of these cases have held that a claim is inadequate if it alleges only a precipitous decline in stock price. *See, e.g.*, *SLM*, 2010 WL 3910566, at *9

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[10] *See, e.g.*, *Bear Stearns*, 2011 WL 223540, at *132-36 (dismissing prudence claim on pleadings); *Am. Express*, 2010 WL 4371434, at *12 (same); *SLM*, 2010 WL 3910566, at *8 (same); *Bank of Am.*, 2010 WL 3448197 (same); *Herrera*, 2010 WL 1028163, at *7 (same); *Gearren*, 2010 WL 532315, at *13 (same); *Lehman Bros.*, 683 F. Supp. 2d 294 (same); *Fisher*, 2010 WL 1257345, at *8 (same); *In re Avon Prods. ERISA Litig.*, No. 05 Civ. 6803 (LAK)(MHD), 2009 WL 848083, at *10 (S.D.N.Y. Mar. 3, 2009), *aff'd by district court*, 2009 WL 884687 (S.D.N.Y. Mar. 30, 2009) ("[T]he Rule 12(b)(6) 'plausibility' standard would be undercut by sustaining a complaint that does not suggest a basis for overcoming the statutorily-based presumption . . . ."); *In re Bausch & Lomb, Inc. ERISA Litig.*, No. 06-CV-6297, 2008 WL 5234281, at *54 (W.D.N.Y. Dec. 12, 2008) (dismissing prudence claim on pleadings).

[11] *See e.g.*, *In re Huntington Bancshares, Inc. ERISA Litig.*, 620 F. Supp. 2d 842, 851-53 (S.D. Ohio 2009) (dismissing ERISA imprudence claims as to employer securities based on bank's alleged "overexposure" to subprime and other troubled loans appropriate with or without prudence presumption); *In re Dell, Inc. ERISA Litig.*, 563 F. Supp. 2d 681, 692 (W.D. Tex. 2008) ("The Court must therefore determine at the motion to dismiss stage whether the Plaintiffs have pled facts which, taken as true, could overcome the *Moench* presumption"); *Halaris v. Viacom, Inc.*, 06-cv-1646-N, 2008 WL 3855044, at *2 (N.D. Tex. Aug. 19, 2008) ("Plaintiffs' pleadings . . . fail to overcome the *Moench* presumption"); *In re RadioShack Corp. ERISA Litig.*, 547 F. Supp. 2d 606, 614 (N.D. Tex. 2008) (applying presumption on 12(b)(6) motion).

(dismissing claim where plaintiff alleged precipitous stock decline but did not allege company's "viability as a going concern was threatened or that its stock was at risk of becoming worthless"); *Bank of Am.*, 2010 WL 3448197, at *21 ("Although a decline in stock value of over 80% may have caused reason for concern about the level of risk involved with continued investment in [Company] common stock, it cannot be said that the Company was in 'imminent danger of collapse.'"); *Lehman Bros.*, 683 F. Supp. 2d at 301 (dismissing for failure to plead "the fiduciary's knowledge at a pertinent time of an imminent corporate collapse or other 'dire situation' sufficient to compel an ESOP sell-off" (internal quotations and citations omitted)); *In re Wachovia Corp. ERISA Litig.*, 2010 WL 3081359, at *14 (W.D.N.C. Aug. 6, 2010) (acknowledging case law deeming large declines in stock, standing along, insufficient to sustain claim of imprudence)

Moreover, with the heightened pleading requirements articulated by the Supreme Court in *Twombly* and *Iqbal*, there can be little debate that application of the *Moench* presumption will materially affect the outcome of a greater number of cases going forward. Resolution of the issue – either for or against defendants – would certainly have significant precedential value and benefit future ERISA litigants within the Second Circuit.

2. Substantial Grounds For Disagreement Exist With Respect To The Presumption Issue.

There are substantial grounds for difference of opinion regarding the application of *Moench* presumption. In its January 6 Order, the Court declined to apply the *Moench* presumption at the pleadings stage, stating that, "on the facts alleged here, [Plaintiff] deserves the opportunity to overcome the presumption" and that "a strict application of [the presumption] is inappropriate at the motion to dismiss stage." (Docket No. 51, p. 7). As the Court's opinion recognizes, however, the Second Circuit has yet to address the issue of whether the *Moench* presumption applies at the pleadings stage. Thus, if the Court were to certify this question for appeal, the Second Circuit would be able to make a definitive pronouncement on an important question of first impression – one of the factors indicating a "substantial ground for difference of opinion" exists. *See Consub Del.*, 476 F. Supp. 2d at 309 (explaining substantial grounds for difference of opinion exists where issue is particularly difficult and of first impression for the Second Circuit).

The Second Circuit has not yet decided whether the presumption applies at the motion to dismiss stage and what plaintiff must plead to overcome the presumption, if it applies. A number of courts with the Second Circuit, however, have addressed these questions. Most courts have taken a different course than the course the Court adopted here in resolving these questions. Since *Twombly*, an even greater number of courts within and outside the Second Circuit have dismissed at the pleading stage allegations similar to those asserted here, because plaintiffs were unable to overcome the *Moench* presumption. *See supra* nn. 10-11. In *Citigroup*, the court "join[ed] that trend [and] appl[ied] the *Moench* presumption" in dismissing plaintiffs' imprudence claims based on plaintiffs' failure to plead allegations stating a plausible claim in light of the *Moench* presumption. *Citigroup*, 2209 WL 2762708, at *17-19.[12] The recent trend, followed in *Citigroup* and more recently adopted in *American Express*, runs counter to the Court's approach here and demonstrates that substantial grounds for disagreement exist with respect to the application of the *Moench* presumption at the motion to dismiss stage. *See Am.*

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12 Cases outside the Second Circuit have similarly trended toward applying the presumption at the motion to dismiss stage. *See, e.g.*, *Benitez v. Humana*, No. 3:08-CV-211, 2009 WL 3166651, at *8-9 (W.D. Ky. Sept. 30, 2009) (holding plaintiffs must allege sufficient facts in complaint that overcome high presumption of prudence in maintaining and investing in employer securities); *Harley-Davidson, Inc. Sec. Litig.*, No. 05-C-0547, 2009 WL 3233747, at *10 n.5 (E.D. Wis. Oct. 8, 2009) (rejecting contention that application of *Moench* presumption "is somehow inappropriate at the motion to dismiss stage" and pointing to circuit court decisions such as *Pugh* and *Edgar* as support for its decision to apply *Moench* presumption to defendants' motion to dismiss employer securities claims); *cf. Huntington Bancshares.*, 620 F. Supp. 2d at 851-53 (finding that plaintiffs' allegations failed to satisfy *Twombly*, regardless of whether the prudence presumption was applied).

Express, 2010 WL 4371434, at *11-12 (recognizing failure to overcome *Moench* presumption as legitimate basis for dismissal on Rule 12(b)(6) motion).

Several recent cases applying the presumption at the motion to dismiss stage have held that allegations of precipitous declines in stock price are insufficient to overcome the presumption. These courts have required plaintiffs to show imminent collapse. *See, e.g.*, *SLM*, 2010 WL 3910566, at *9; *Bank of Am.*, 2010 WL 3448197, at *21. Accordingly, substantial grounds for difference in opinion exist over whether and how the *Moench* presumption should be applied in this case. This Court should therefore certify this controlling question of law for appeal and order to allow the Second Circuit to provide clear guidance to the district courts going forward.

E. The First And Second Certification Elements Are Satisfied With Respect To The Class Period Because It Presents A Controlling Question Of Law As To Which There Is Substantial Ground For Difference Of Opinion.

1. The Class Period Issue Presents A Controlling Question Of Law.

The Order involves yet another controlling question of law – whether dismissal is required where plaintiff fails to plead facts establishing that investment in employer securities was imprudent at the beginning of the class period. As with all of the legal questions presented above, resolution of this question could result in dismissal of the action. The question, therefore, is controlling. *See Klinghoffer*, 921 F.2d at 24. Moreover, resolution of the issue would certainly have significant precedential value and benefit future ERISA litigants within this Circuit. *See id.* (noting decision that holds broader significance for Second Circuit constitutes prime candidate for interlocutory review). An appellate ruling on this issue would define with specificity the pleading requirements, making it clear to plaintiffs and defendants alike that facts establishing the imprudence of employer securities must be pled to exist at the beginning (and throughout) the class period. This would assist defendants in opposing insufficient claims, assist plaintiffs in crafting legally sufficient claims, and assist courts in differentiating between the two. Based on the controlling nature of this legal question, the first certification element is satisfied.

2. Substantial Grounds For Disagreement Exist With Respect To The Class Period Issue.

The Court's decision did not explicitly address Defendants' argument that Plaintiff's prudence claim fails, as a matter of law, absent allegations demonstrating imprudence at the beginning of the class period. Rather, the Court pointed to a series of facts, almost all occurring *after* the start of the class period, which it found to substantiate Plaintiff's prudence claim and held that such allegations raised Plaintiff's rights to relief above the speculative level.

Contrary to the Opinion here, several recent decisions have recognized the importance, at the motion to dismiss stage, of alleging facts sufficient to determine when it became imprudent to hold the employer securities and to establish prudence throughout the class period. *See, e.g.*, *SLM*, 2010 WL 3910566, at *8 (criticizing plaintiff for deliberately tacking an additional fifteen months onto proposed class period "without adding any substantive allegations relating to that interval" and describing tactic as "opportunistic rummaging"); *Lehman Bros*, 683 F. Supp. 2d at 302 (citing complaint's failure to permit determination of when company's financial condition reached imminent collapse and that defendants knew about company's true financial state throughout the class period as basis for dismissal); *see also In re Computer Scis. Corp ERISA Litig.,* 635 F. Supp. 2d 1128, 1135 (C.D. Cal. 2009) (summary judgment) (dismissing claims that stock became imprudent "no later than the first day of the class period" because plaintiffs "failed to sufficiently explain why Defendants should have known of the alleged lack of controls at this time").

These decisions, based on ERISA's requirement that prudence be measured by "the circumstances then prevailing" at the time of the allegedly imprudent act, and not "'whether [the] investment[] [ultimately] succeeded or failed,'" demonstrate that substantial grounds for disagreement exist regarding the Court's resolution of Class Period Issue. *See Kirschbaum*, 526 F.3d at 253 (citing *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983)); 29 USC §1104(a)(1)(B); *see also Johnson*, 2009 WL 2137241, at *13 (collecting cases); *Keach v. U.S. Trust Co.*, 419 F.3d 626, 638 (7th Cir. 2005) ("ERISA's fiduciary duty of care 'requires prudence, not prescience'"). The second certification element is, therefore, satisfied.

F. The Third Certification Element For Is Satisfied For All Four Legal Questions For Which Defendants Seek Certification Because Resolution In Defendants' Favor Of Any One Of The Questions Will Materially Advance The Termination Of This Litigation.

Certification under § 1292(b) should be granted where the controlling issue of law will "greatly assist in the ultimate termination of the litigation." *Klinghoffer*, 921 F.2d at 25. Here, reversal of the Court's ruling on any one of the legal questions Defendants seek to certify will result in dismissal of Plaintiff's prudence claim and his derivative claim. *See Johnson*, 2009 WL 2137241, at *24 (dismissing derivative claims absent valid claim of breach of fiduciary duty). Without an immediate appeal, the parties will be forced to engage in extensive litigation, including discovery and summary judgment briefing. Prompt resolution of any one of these issues will allow the parties to avoid that expensive and unnecessary discovery and briefing. Defendants' motion, therefore, satisfies the third certification element with respect to the each of the issues it seeks to certify.

While the Second Circuit's decisions in the *Citigroup* or *Gearren* case may resolve the Hard-wiring and Presumption Issues, there is no guarantee that they will. The Second Circuit may resolve either or both matters on grounds. Additionally, this motion seeks certification of issues not presented in *Citigroup* or *Gearren* – issues which, as discussed above, would be dispositive of this case and have potential Circuit-wide significance.

Having demonstrated that each of the four questions Defendants seek to certify constitutes a controlling question of law on which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation, certification of each question for interlocutory appeal is warranted pursuant to § 1292(b).

G. The Court Should Stay Proceedings Pending The Appeal.

Defendants respectfully request that the Court stay further proceedings in this matter pending resolution of the appeal. A stay is appropriate because the determination of the appeal in Defendants' favor would result in dismissal of the lawsuit. It is better to have these potentially dispositive issues resolved early in the litigation before the Court, Plaintiff, and Defendants have expended significant resources. Accordingly, a stay is appropriate because it would avoid a waste of the Court's and the parties' resources. Courts granting certification for interlocutory appeal routinely grant such stays. *See, e.g.*, *Benedict v. Town of Newburgh*, 95 F. Supp. 2d 136, 144 (S.D.N.Y. 2000); *Lee v. Coughlin*, 26 F. Supp. 2d 615, 638 (S.D.N.Y. 1998).

III. CONCLUSION

For all of the foregoing reasons, Defendants respectfully requests that the Court certify the Order for interlocutory review pursuant to 28 U.S.C. § 1292(b) and, in addition, that the Court stay all proceedings in this action until the Second Circuit has resolved the appeal.

Dated: January 28, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO CERTIFY THE COURT'S JANUARY 6, 2011 ORDER FOR INTERLOCUTORY APPEAL AND TO STAY RELATED PROCEEDINGS PENDING RESOLUTION OF APPEAL has been filed and served by Notice of Electronic Filing pursuant to Rule 5(b)(2)(E), Federal Rules of Civil Procedure on this 28th day of January, 2011.

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